

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte PATRICK ZEITER AND HEINZ OSTER

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Appeal No. 2001-0199  
Application 09/179,813

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HEARD: JUNE 11, 2002

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Before GARRIS, TIMM, and MOORE, Administrative Patent Judges.

MOORE, Administrative Patent Judge.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 20-29, all of the claims of this pending application.

## CLAIMS

Claims 20, 21, 23, and 27 are representative of the claims on appeal, and read as follow:

20. Cold-formed shaped packaging which comprises a shaped packaging made of a metal-plastic laminate with at least one packaging recess therein formed between a retaining tool and a die exhibiting at least one opening, wherein the die and the retaining tool feature facing edge regions and the die within the die edge region includes a shoulder region that surrounds said at least one die opening, wherein the shoulder region includes a surface thereof and the die edge region includes a surface thereof, and the surface of the shoulder region lies 0.1 to 10 mm lower than the surface of the die edge region, and at least one first stamp including a first friction forming surface which pre-forms the metal-plastic laminate in at least one step up to 100% of the final depth of the recess, and subsequently at least one second stamp including a second friction forming surface which forms the pre-formed metal-plastic laminate in at least one step to at least 100% of the final depth of the recess, wherein the first friction forming surface has a higher degree of friction than the second friction forming surface, and wherein said shaped packaging is free of folds.

21. Cold formed shaped packaging according to claim 20, characterized in that the shaped packaging is made of a metal-plastic laminate containing in its make up

oPA 25 / Al 45 / PVC 60 or  
oPA 25 / Al 45 / oPA 25 or  
Al 120 / PP 50 or  
oPA 25 / Al 60 / PE 50 or  
oPA 25 / Al 60 / PP 60 or  
oPA 25 / Al 45 / PVC 100 or  
oPA 25 / Al 60 / PVC 60 or  
oPA 25 / Al 45 / PE coated or  
oPA 25 / Al 45 / cPA 25 or  
oPA 25 / Al 60 / PVC 100 or  
oPA 25 / Al 60 / oPA 25 / EAA 50

where oPA stands for oriented polyamide, cPA stands for cast polyamide, PVC stands for polyvinylchloride, PE stands for polyethylene, PP stands for polypropylene, EAA stands for ethylene-acrylic acid copolymer, and Al stands for aluminum and the numbers for the thickness of the layer or foil in  $\mu\text{m}$ .

23. Cold formed shaped packaging according to claim 20, including a plurality of recesses spaced apart from each other.

27. Cold formed shaped packaging according to claim 23, including a ratio of diameter to height of said recesses of 2-3.

### THE REFERENCES

In rejecting the appealed claims under 35 U.S.C. §102 and §103, the Examiner relies on the following single reference:

Breitler et al. (Breitler)	5,589,275	Dec. 31, 1996
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### THE REJECTIONS

Claims 20-26, 28, and 29 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Breitler.

Claims 20-29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Breitler.

We affirm both rejections.

### DISCUSSION

The present invention relates to a cold-formed shaped packaging free of folds made of a metal-plastic laminate with at least one packaging recess therein. (Appeal Brief, page 2, lines 16 - 18). The metal-plastic laminate is formed between a retaining tool and a die exhibiting at least one opening, with the die and retaining tool including facing edge regions. The die within the die edge region includes a shoulder region that surrounds the die opening or openings. The surface of the die edge region lies 0.1 - 10 mm lower than the surface of the die edge region. (Appeal Brief, page 3, lines 12-21).

To form the laminate having a packaging recess, a first stamp having a friction forming surface which pre-forms the metal-plastic laminate is provided, and a second stamp is provided which has a second friction forming surface which forms the pre-

formed metal-plastic laminate to final depth. (Appeal Brief, page 3, line 22 - page 4 line 5).

**The Rejection of Claims 20-26, 28 and 29 Under 35 U.S.C. §102(e) over Breitler**

Claims 20-26, 28 and 29 stand rejected under 35 U.S.C. §102(e) as being anticipated by Breitler. Breitler is said to teach a metal-plastic composite including a metal layer 8 - 80  $\mu\text{m}$  thick with plastic layers 20 - 50  $\mu\text{m}$  thick on either side of the metal layer. Aluminum and biaxially oriented polyamide are said to be preferred materials for the layers, and Example 5 to illustrate a laminate having a 45  $\mu\text{m}$  thick aluminum layer between two 25  $\mu\text{m}$  thick polyamide layers. The material is said to be suitable for the stretch drawing of blister packs having from 5 to 50 individual compartments having an exemplary recess diameter of 27 mm. (Examiner's Answer, page 3, lines 9 - 19). Finally, the Examiner finds that the Breitler containers are "free of folds" since flatness after shaping is a property desired by the packaging industry and an objective of Breitler is to provide packaging material with desirable packaging properties (Examiner's Answer, page 4, lines 1-4).

The Appellants' principal argument is that as Breitler does not teach the claimed process steps "or the significant and unexpected advantages thereof" (Appeal Brief, page 7, lines 4-5; Reply Brief page 2, line 3 – page 4, line 9). The Appellants reiterate on page 8, lines 4 – 9 of the Appeal Brief that "the Appellants obtain surprising and unexpected results". The Appellants attorney argues that the invention as claimed enables one to process asymmetric laminates free of folds and wrinkles, obtaining high sidewalls, and that these results are "surprising", "unexpected" and "unobvious". (Appeal Brief, page 9, lines 4–15). As the present rejection relates to anticipation, not

obviousness, the Appellants have essentially provided no argument as to why the claims are not anticipated.

We note that these claims are written in product-by-process format, and as such are anticipated by a disclosure which is the same as a product made by the recited process, no matter how the reference product was made. In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985).

The Examiner has correctly observed that the product produced by the Appellants' process as claimed in claim 20 is identical to a product as outlined by Breitler. Breitler yields a cold formed shaped packaging made of a metal-plastic laminate (Examples 1-6 illustrate metal-plastic laminates, see column 8, lines 6 – 56) having a packaging recess (the materials of Examples 1-6 are stretch drawn over a hemispherical sphere of radius 13.5 mm in Example 7, column 8, lines 60-67). The Examiner found this material to be free of folds, and the Appellants did not challenge this finding. Thus, we agree that each of the claimed elements of the product formed by the Appellants' process is found in Breitler, and we affirm the anticipation rejection for claim 20, 22-26, and 28-29.

The Appellants have argued claim 21 separately, stating that this claim "lists numerous specific asymmetric laminates" (Appeal Brief, page 9, lines 18-19). While claim 21 does list some asymmetric laminates, it also lists oPA 25 / AL 45/ oPA 25, a symmetric laminate which is directly anticipated by Breitler's Example 1, at column 8, lines 5-21. The anticipation rejection of claim 21 is therefore also affirmed.

**The Rejection of Claims 20-29 Under 35 U.S.C. §103(a) Over Breitler**

As we have affirmed the anticipation rejection for claims 20-26, and 28-29, and anticipation is the “ultimate or epitome of obviousness,” In re Kalm, 378 F.2d 959, 962, 154 USPQ 10, 12 (CCPA 1967), we therefore summarily affirm the obviousness rejection of these claims.

As regards claim 27, which the Appellants have argued separately, the Examiner states that Breitler teaches containers having a diameter to height ratio of 4:1, preferably 3.7:1 to 3.2 to 1. The Examiner notes that, absent some demonstrated criticality or unexpected results, it would have been obvious to one of ordinary skill in the art to adjust the diameter to height ratio based on the dimensions of the object to be packaged (Examiner’s Answer, page 4, lines 9-14).

The Appellants assert that the Examiner has conceded that the ratio of diameter to height of 2-3 is not shown in the reference and this diameter represents a “significant advantage of the present invention over the teaching of the [Breitler] patent” (Appeal Brief, page 10, lines 9-10).

Other than this conclusory statement, the Appellants have provided us with no evidence as to why this dimension is critical or such an advantage. We agree with the Examiner that the adjustment of this dimension from the height to diameter ratio disclosed in Breitler of preferably from 1:3.7 to 1:3.2 (column 7, lines 1-2) to the claimed ratio of diameter to height of 2-3 in claim 27 is the adjustment of a result-effective variable (in this instance, fitting the packaging to the object to be packaged). The discovery of an optimum value of result effective variable in a known process is ordinarily within the skill of one of ordinary skill in the art. See, e.g. In re Boesch, 617 F.2d 272, 277, 205 USPQ2d 215, 219 (CCPA 1980).

We therefore affirm this rejection.

Summary of Decision

The rejection of Claims 20-26, 28, and 29 under 35 U.S.C. § 102(e) as being anticipated by Breitler is affirmed.

The rejection of Claims 20-29 under 35 U.S.C. § 103(a) as being unpatentable over Breitler is affirmed.

Time Period for Response

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

**AFFIRMED**

BRADLEY R. GARRIS  
Administrative Patent Judge

CATHERINE TIMM  
Administrative Patent Judge

JAMES T. MOORE  
Administrative Patent Judge

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